

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
April 3, 2006 Session

**WENDY WHITMAN ROSE v. WILLIAM SEHON ROSE, JR.**

**Appeal from the Fourth Circuit Court for Knox County  
No. 93888 Bill Swann, Judge**

**Filed April 27, 2006**

**No. E2005-01833-COA-R3-CV**

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Wendy Whitman Rose (“Mother”) and William Sehon Rose, Jr. (“Father”) were divorced in February of 2004. The parties entered into a marital dissolution agreement dividing the parties’ marital and separate property and establishing joint custody of the parties’ two children with equal co-parenting time. The terms of the marital dissolution agreement were incorporated into the final judgment of divorce. The Trial Court later found Mother in civil contempt for willfully failing to return property to Father as required by the final judgment. The Trial Court incarcerated Mother for the civil contempt, although she quickly was released and thereafter purged herself of the contempt. Mother also was required to pay attorney fees incurred by Father in pursuing the contempt proceedings, and to reimburse Father for property that was lost or damaged while wrongfully in Mother’s possession. Mother appeals. We affirm the Trial Court’s various findings pertaining to the civil contempt proceedings, but dismiss all other issues for lack of a final judgment as required by Tenn. R. App. P. 3(a).

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Fourth Circuit  
Court Affirmed in Part and Appeal Dismissed in Part; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

David C. Lee, Knoxville, Tennessee, for the Appellant Wendy Whitman Rose.

L. Caesar Stair, III, Knoxville, Tennessee, for the Appellee William Sehon Rose, Jr.

## **OPINION**

### **Background**

This litigation began in May of 2003 when Mother filed a complaint for divorce after five years of marriage to Father. The complaint was filed in the Fourth Circuit Court for Knox County. As grounds for divorce, Mother alleged that Father was guilty of inappropriate marital conduct or, in the alternative, that irreconcilable differences had arisen between the parties. Mother sought to be designated the primary residential parent of the parties' two minor sons, who were ages 2 and 5 when the divorce complaint was filed. Father answered the complaint, generally denying that he engaged in any inappropriate marital conduct, but admitting that irreconcilable differences had arisen between the parties. Father also filed a counterclaim for divorce, alleging that Mother had committed adultery and was guilty of inappropriate marital conduct. Father likewise sought to be designated the primary residential parent for the parties' two children.

There was serious disagreement between the parties on just about everything as this litigation proceeded. Nevertheless, after over 28 hours of mediation, the parties were able to reach a mediated agreement and entered into a marital dissolution agreement ("MDA"). In the MDA, the parties agreed to joint custody of the children with equal co-parenting time. The parties also agreed on the distribution of the marital and separate property. Because the parties were able to reach an agreement and enter into an MDA, a final judgment for divorce was entered based upon the stipulated grounds of irreconcilable differences. The parties were divorced in February of 2004 and the final judgment of divorce incorporated the terms of the MDA.

In November of 2004, Father filed a Petition for Contempt claiming Mother failed to comply with the terms of the MDA by keeping property belonging to Father. Father claimed Mother improperly denied having any of the property at issue in his petition. Mother responded to the petition, generally denying that she had any property which rightfully belonged to Father. A hearing was scheduled originally for February 25, 2005, but because Mother's then attorney was detained in another court thereby leaving insufficient time to conduct the hearing, the Trial Court rescheduled the hearing for May 20. However, counsel for the parties informed the Trial Court that Mother would return to Father all of Father's personal property in her possession no later than noon on March 2.

Following the rescheduled hearing on May 20, 2005, the Trial Court entered an order requiring Mother to pay Father \$1,300 for damage to Father's personal property that occurred while Mother improperly retained possession of that property. The Trial Court determined that Mother was in civil contempt of court for failing to provide proof of an independent trustee as set forth in the life insurance provision of the permanent parenting plan previously entered by the Trial Court. The Trial Court also held Mother in contempt for failing to return all of Father's personal property to him. The Trial Court then stated that Mother:

shall be incarcerated until such time as she returns all of the items set forth on [Father's] list (Exhibit 1) or she pays [Father] the value for each missing item that she does not return set out on Exhibit 1, and until she provides proof of an independent trustee of the life insurance for the parties' minor children.

Mother was taken to jail and counsel for the parties quickly entered into a hand-written order titled "Order of Conditional Release from Incarceration." This order provided that Mother was to be released from jail immediately and was to return to court on May 24, 2005. The order provided that Mother would be re-incarcerated if she did not prove on that date that she had purged herself of contempt. Mother returned to court as agreed and established to the Trial Court that she had purged herself of contempt. An Agreed Order was entered establishing Mother's compliance with the previous order and that she had thereby purged herself of contempt. On June 24, 2005, Mother filed a notice of appeal from the order finding her in civil contempt and ordering her incarceration.

Three days after the hearing on May 24, 2005, attorney David C. Lee ("Mr. Lee") entered an appearance with the Trial Court indicating his intent to serve as co-counsel for Mother. However, prior to entry of the notice of appearance, Mr. Lee announced his intent to run for judge of the Fourth Circuit Court in the next election. Following Mr. Lee's announcement of his intent to seek election, the Trial Court judge, Bill Swann ("Judge Swann") barred Mr. Lee from practicing in the Fourth Circuit Court. As a result, at the same time Mr. Lee filed the notice of appearance and because Judge Swann had prohibited Mr. Lee from practicing in the Fourth Circuit Court, Mother simultaneously filed a motion asking Judge Swann to recuse himself from the case. Judge Swann denied the motion to recuse, and Mother filed a second notice of appeal wherein she appealed the denial of her motion to recuse and Judge Swann's not allowing Mr. Lee to represent her. Thereafter, Mother's attorney was allowed to withdraw from the case and attorney Craig Garrett undertook Mother's representation since Judge Swann would not allow Mr. Lee to practice in the Fourth Circuit Court.

When Mother was found in contempt, the Trial Court awarded attorney fees to Father. A hearing was held on the amount of attorney fees to be awarded and, after the fees were awarded, Mother filed an Amended Notice of Appeal on August 4, 2005. This time she appealed "from the award of attorney fees, from the order denying her motion to recuse, from the order preventing her demand to substitute attorney David Lee for attorney Brian Starnes, and from all other matters without limit."

Judge Swann's prohibition from allowing Mr. Lee to practice in the Fourth Circuit Court was all encompassing and did not apply just to the present case. One of these other cases it applied to was *Joiner v. Joiner*. In the *Joiner* case, Mr. Lee, on behalf of his client in that case, filed a Tenn. R. App. P. 10 application for extraordinary appeal with this Court, which we granted. Our decision in *Joiner* was filed on October 27, 2005. We concluded:

The action of the trial judge in this case is also contrary to the public policy of encouraging competent individuals to run for judgeships. One would hope that those who practice family law would be a significant part of the pool of attorneys who might be interested in serving the public as a judge of a court having family law jurisdiction. Such would probably not be the case if the announcement of one's intention to run for a family law judgeship would mean the loss of that portion of one's practice.

Mr. Lee has been duly admitted to practice before the courts of this State. This includes the right to practice in Fourth Circuit Court. This right cannot be taken away from him absent his misconduct or failure to abide by applicable rules governing the practice of law. There is no evidence that he has been guilty of either. Certainly, his announced intention to run against the trial judge does not fall within the definition of misconduct or otherwise violate an applicable rule with respect to the practice of law. While a judge with respect to his or her court has the “inherent power to control the exercise of the administration of justice,” that power is not so expansive as to include disbarment of a potential and announced challenger for the judge's position from practicing in the court that the trial judge is currently occupying simply because of the challenger's announcement.

We hold that the trial judge erred in disbaring Mr. Lee from representing Husband in Fourth Circuit Court.

*Joiner v. Joiner*, No. E2005-01619-COA-R10-CV, 2005 WL 2805566, at \*\* 8, 9 (Tenn. Ct. App. Oct. 27, 2005).

One day before the release of our Opinion in *Joiner*, Father filed a petition for change of custody from the then existing order which established joint custody with equal co-parenting time. Father claimed there had been a material change in circumstances warranting a change in custody and that it was in the children's best interests for him to be designated the children's primary residential parent. Father alleged, among other things, that Mother was cohabitating with her boyfriend during her co-parenting time. Father also alleged Mother was neglecting the children when she had co-parenting time by leaving them with babysitters “until the early hours of the next morning and often returning home intoxicated.” A hearing was held two days after the petition for change in custody was filed, and counsel for both parties were present. Following the hearing, the Trial Court entered a Temporary Parenting Plan temporarily designating Father as the children's primary residential parent.

On November 10, 2005, Mother filed a supplemental motion for recusal prepared by Mr. Lee and which relied at length on the *Joiner* opinion. Approximately one week later, attorney Garrett filed a motion to withdraw as Mother's counsel of record. The motion to recuse was scheduled for hearing on November 18, 2005, but was continued due to the unfortunate death of Judge Swann's mother. From the record before us, it does not appear that the supplemental motion to recuse has been ruled upon by Judge Swann.

On November 23, 2005, Mother filed a Tenn. R. App. P. 10 application for extraordinary appeal from the October 28 order temporarily transferring primary residential custody of the children to Father. On December 7, 2005, we denied the application for a Rule 10 extraordinary appeal.

Mother appeals claiming: (1) the Trial Court erred when it found her in civil contempt; (2) the Trial Court erred when it refused to allow Lee to represent Mother; (3) the Trial Court erred when it denied Mother's motion to recuse; (4) the Trial Court erred in the amount of attorney fees awarded to Father; (5) the Trial Court erred when it calculated the value of the items Mother improperly took from Father; and (6) the Trial Court erred when it changed custody of the children to Father.

While this appeal was pending, Father filed a motion to supplement the record on appeal and a motion to dismiss the appeal claiming the appeal was frivolous and he was entitled to damages. The main thrust of Father's motion to dismiss is his argument that there is no final appealable judgment. Because the documents Father seeks to supplement the record with are necessary to the resolution of this appeal, that motion is granted.

### **Discussion**

We first will discuss Mother's claim that the Trial Court erred in finding her in contempt. "Appellate courts review a trial court's decision to impose contempt sanctions using the more relaxed 'abuse of discretion' standard of review." *McDowell v. McDowell*, No. M2000-00164-COA-R3-CV, 2001 WL 459101, at \* 5 (Tenn. Ct. App. May 2, 2001), *no appl. perm. appeal filed* (quoting *Sanders v. Sanders*, No. 01A01-9601-GS-00021, 1997 WL 15228, \*3 (Tenn. Ct. App. 1997) and citing *Hawk v. Hawk*, 855 S.W.2d 573, 583 (Tenn. 1993)).

In *Moody v. Hutchison*, 159 S.W.3d 15 (Tenn. Ct. App. 2004), we quoted from *State v. Green*, 689 S.W.2d 189 (Tenn. Crim. App. 1984) when stating that "a judgment of contempt, summary or otherwise becomes final upon the entering of punishment therefor, 17 C.J.S. *Contempt* § 114 (1963), and is thus appealable as of right under Rule 3 T.R.A.P. It matters not that the proceedings out of which the contempt arose are not complete." *Moody*, 159 S.W.3d at 30, 31 (quoting *Green*, 689 S.W.2d at 190). Accordingly, we conclude that the Trial Court's finding that Mother was in contempt and ordering her incarceration is a final appealable order.

Mother claims on appeal that she “did not specifically assist her mother and some movers in packing at the marital home and instead worked in her newly formed insurance agency. That was a mistake in hindsight because [Mother] was not able to supervise the move directly and some items were taken that should not have been.” Based on this, Mother claims there was no proof that she willfully violated the Trial Court’s order regarding the property distribution and, therefore, could not be held in civil contempt. We, as did the Trial Court, disagree for several reasons. First, this would require us to assume that Mother was telling the truth when making these assertions. At the trial on the petition for contempt, the Trial Court specifically stated that Mother’s “credibility as to these various statements is zero.... Her testimony cannot be relied upon today.” In *Wells v. Tennessee Bd. of Regents*, our Supreme Court observed:

Unlike appellate courts, trial courts are able to observe witnesses as they testify and to assess their demeanor, which best situates trial judges to evaluate witness credibility. See *State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990); *Bowman v. Bowman*, 836 S.W.2d 563, 566 (Tenn. Ct. App. 1991). Thus, trial courts are in the most favorable position to resolve factual disputes hinging on credibility determinations. See *Tenn-Tex Properties v. Brownell-Electro, Inc.*, 778 S.W.2d 423, 425-26 (Tenn. 1989); *Mitchell v. Archibald*, 971 S.W.2d 25, 29 (Tenn. Ct. App. 1998). Accordingly, appellate courts will not re-evaluate a trial judge’s assessment of witness credibility absent clear and convincing evidence to the contrary. See *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315-16 (Tenn. 1987); *Bingham v. Dyersburg Fabrics Co., Inc.*, 567 S.W.2d 169, 170 (Tenn. 1978).

*Wells v. Tennessee Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999). There is no clear and convincing evidence that the Trial Court’s assessment of Mother’s credibility, or lack thereof, was in error.

Second, even assuming that Mother only mistakenly took some of Father’s property at the outset, Mother fails to offer any explanation as to why she repeatedly denied having this property when Father asked for it to be returned prior to his filing the petition for contempt. Even if she did not willfully take the property in violation of the court order, she willfully failed to check and see if she nevertheless “mistakenly” ended up with this property following her move. Mother repeatedly took the stance that she did not have this property both before and after the petition for contempt was filed. While Mother eventually did return some of the property a little at a time, she did not return it all and even went so far as to wait until the day of trial and return additional property during the Trial Court’s recess for a lunch break. Even then not all of Father’s property was returned, resulting in the Trial Court finding her in contempt and ordering her incarceration. Only after Mother was conditionally released from jail and agreed to return to court on May 24, 2005, did she take matters seriously and come into compliance with the Trial Court’s previous order. Upon her return to court, the parties entered an agreed order setting forth the remaining items that Mother

returned to Father and further showing that she paid Father the value of any items that had been damaged or otherwise could not be accounted for.<sup>1</sup>

As pertinent to this appeal, Tenn. Code Ann. § 29-9-102(3) authorizes courts to “inflict punishments for contempts of court” in situations involving the “willful disobedience or resistance of any ... party ... to any lawful writ, process, order, rule, decree, or command of such courts....” The facts in this case certainly do not preponderate against the Trial Court’s conclusion that Mother was in willful contempt of a court order, and it necessarily follows that the Trial Court did not abuse its discretion when it found Mother in contempt.

The next issue is Mother’s claim that the Trial Court erred in the amount of attorney fees awarded to Father which he incurred in the contempt proceedings. Mother simply argues that the amount of fees awarded was in error because Father’s attorney “has been able to generate a large amount of his fees by continuing to argue over the possession of small items in the Marital Dissolution Agreement.” Mother overlooks the obvious response to this argument that all of these attorney fees could have been avoided had she complied with the Trial Court’s order in the first place. We also note that Mother does not specifically challenge any of the attorney fees by claiming they were unreasonably incurred when pursuing the contempt petition. Likewise, Mother cites us to no proof in the record to support a claim that the attorney fees awarded were in any way unreasonable. In short, Mother simply argues that the fees were too much but fails to direct us to anything in the record to support such a position. The Trial Court’s award of attorney fees to Father and the amount of that award is, therefore, affirmed.

Mother’s next argument regarding the finding of civil contempt surrounds the value given to the property that had been awarded to Father but which was lost or damaged when wrongfully in Mother’s possession. Mother argues that the Trial Court applied the wrong legal standard when valuing the property. Once again, Mother claims that the amount awarded by the Trial Court was just too much, but she stops there. Mother does not tell this Court what the items of property actually were, the value placed on these items by Father, the value placed on these items by the Trial Court, or what Mother believes the appropriate value should be, along with citations to the record where we can evaluate the proof she claims supports her argument, assuming there even is any such proof in the record. Without any of this necessary information, we must affirm the Trial Court’s judgment on this matter.

Finally, we note that Mother never challenges the Trial Court’s finding that she was in civil contempt for failing to provide proof of an independent trustee for the life insurance. Thus, we would affirm the Trial Court’s finding that she was in civil contempt even if we agreed with her argument that she did not willfully take and keep any of Father’s property.

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<sup>1</sup> Interestingly, one of the items Mother took which was turned over following her incarceration but prior to the May 24 hearing was a Kittinger credenza. Even assuming that someone can accidentally take a credenza and not know they took it, we are at a total and complete loss as to how Mother can seriously claim that she never realized she actually had this piece of furniture that belonged to Father.

For the foregoing reasons, we affirm the Trial Court's finding that Mother was in civil contempt, we affirm the amount of attorney fees awarded to Father, and we affirm the value placed on Father's property that was damaged or lost while in Mother's possession.

With regard to Mother's remaining issues, we note that Tenn. R. App. P. 3(a) provides, in pertinent part, that:

(a) Availability of Appeal as of Right in Civil Actions. – In civil actions every final judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Appeals is appealable as of right. Except as otherwise permitted in Rule 9 and in Rule 54.02 Tennessee Rules of Civil Procedure, if multiple parties or multiple claims for relief are involved in an action, any order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before entry of a final judgment adjudicating all the claims, rights, and liabilities of all parties.

Mother claims the Trial Court erred when it refused to grant her motion for recusal. However, after our decision in *Joiner* was released, Mother filed a supplemental motion for recusal and the Trial Court has yet to rule on that motion, at least according to the record before us on appeal. Therefore, there is no final ruling on that issue.

Mother also claims the Trial Court erred when it changed custody of the children to Father. However, that order specifically stated that it was "temporary" and, by definition, there has been no permanent resolution of Father's petition for a change in custody.

In short, there are several matters outstanding with the Trial Court. There is no final judgment which adjudicates all of the rights and liabilities of the parties as contemplated by Tenn. R. App. P. 3(a). Therefore, except for the civil contempt ruling which we have affirmed, all remaining issues raised by Mother must be dismissed for a lack of a final judgment. This case is remanded to the Trial Court for resolution of the outstanding matters.<sup>2</sup>

Finally, we address Father's claim that Mother's appeal is frivolous and he is entitled to damages, including attorney fees incurred on appeal. After reviewing the entire record on appeal, including the fact that Mother did appeal from a final judgment with regard to the contempt finding, we decline to hold that this appeal was frivolous and award any damages. Mother also requests attorney fees incurred on appeal, and her request is denied.

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<sup>2</sup> In light of our holding in *Joiner*, we assume that the Trial Court has complied with the directives of this Court and allowed attorney Lee to represent Mother in this case. In the unlikely event that is not the case and the Trial Court has continued to refuse to allow Lee to represent Mother following the release of the *Joiner* opinion, then Mother has the availability of filing a Tenn. R. App. P. 10 extraordinary appeal from that decision.



### **Conclusion**

The judgment of the Trial Court finding Mother in civil contempt, awarding attorney fees to Father, the amount of those fees, and the value placed on Father's property which was lost or damaged by Mother is affirmed. All remaining issues raised by Mother are dismissed for lack of a final judgment. This case is remanded to the Trial Court for further proceedings consistent with this Opinion, and for collection of the costs below. Costs on appeal are taxed to the Appellant, Wendy Whitman Rose, and her surety.

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D. MICHAEL SWINEY, JUDGE